No. 93-6497

In The

Supreme Court of the United States

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S BRIEF IN REPLY

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QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651(a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

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INTRODUCTION

This Court must determine whether a federal habeas court has jurisdiction to stay an execution of a state death sentence in order to effectuate the statutory right to counsel provided by Congress in 21 U.S.C. § 848(q)(4)(B). The parties agree that 28 U.S.C. § 2251 empowers a federal district judge "before whom a habeas corpus proceeding is pending" to stay an execution "for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251. They disagree, however, about the circumstances which permit resort to § 2251.

Respondent relies primarily on three arguments. First, Respondent asserts that a district court's only source of authority to grant a stay is 28 U.S.C. § 2251. Notwithstanding Congress' enactment of § 848(q)(4)(B), which guarantees counsel "[i]n any post-conviction proceeding under [28 U.S.C.] Section 2254," Respondent insists that a "habeas corpus proceeding," as used in § 2251, is not commenced until a formal and legally sufficient habeas corpus petition is filed with or without counsel. RB at 7-27. In other words, even if the district court had authority to appoint counsel for Mr. McFarland before the filing of a formal petition, it had no power to stay his execution under § 2251 for the purpose of doing so, or of providing counsel with sufficient time to discharge her duties. *Id.*

Second, Respondent argues that § 848(q)(4)(B) cannot be considered an express exception to the Anti-Injunction Act. RB at 18-22. To support this argument, Respondent denigrates the § 848 entitlement as a mere "procedural rule applicable only to federal proceedings," unenforceable in a habeas proceeding or any other action. RB at 18. Additionally, Respondent denies the existence of any circumstances under which a stay of execution would be necessary in order to effectuate the clear intent of § 848(q) that all indigent prisoners seeking to vacate or set side a death sentence shall have the assistance of counsel in presenting their claims in § 2254 proceedings.

Respondent's third argument attempts to justify the anomalous intent imputed to Congress by its first two. According to Respondent, there is nothing inconsistent with Congress, on the one hand, *requiring* the federal district court to appoint counsel to represent a petitioner in connection with the preparation and filing of a habeas petition, while *forbidding* that court from granting a stay in order to do so. Respondent maintains that if the federal right to counsel is lost – by the prisoner's execution – it must be because the prisoner waited too late to assert it.[1]

Mr. McFarland addresses these mistaken contentions in turn.

I. FEDERAL DISTRICT COURTS HAVE AUTHORITY TO ISSUE STAYS TO PROVIDE SUFFICIENT TIME FOR COUNSEL TO BE APPOINTED AND TO PREPARE A HABEAS PETITION.

Respondent argues that the Anti-Injunction Act, 28 U.S.C. § 2283, which restricts the ability of a federal court to enjoin state court proceedings, precludes a federal habeas court from staying an execution in order to appoint or provide counsel sufficient time to prepare and file a proper petition unless a formal and legally sufficient habeas petition has already been filed. The parties agree, however, that the Act excepts injunctions that are (1) expressly authorized by federal law; (2) "in aid of" the respective court's jurisdiction; or (3) necessary to protect or effectuate a federal court's judgment. As demonstrated in Mr. McFarland's opening brief, the first two exceptions permit a federal district court to stay an execution before the filing of a habeas petition when the stay is necessary to effectuate the statutory right to counsel.

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[1] In Respondent's view, "[t]he effectiveness of [§ 848(q)(4)(B) does] not depend on a federal habeas court's ability to stay an execution, [but on] a petitioner's timely request for appointment." RB at 16.

A. If a district court has jurisdiction to order the appointment of counsel prior to the filing of the habeas petition, it also has sufficient jurisdiction to stay an execution prior to the filing of the petition.

When it enacted 21 U.S.C. § 848(q)(4)(B), Congress guaranteed counsel to indigent prisoners "[i]n any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence. . . . " *Id.* There is no dispute between the parties that Congress thereby intended to afford counsel to prisoners to provide expertise in investigating, researching, drafting and presenting available claims for relief.[2] It necessarily follows, as *Amicus* CJLF acknowledges, that § 848(q)(4)(B) authorizes the appointment of counsel before the filing of a formal and legally sufficient habeas petition.

If Mr. McFarland and Respondent's supporting *amicus* CJLF are correct in this regard, it logically follows that a federal district court also has jurisdiction, under several theories, to stay an execution when necessary to protect the federal statutory right to the assistance of counsel.

(1) The district courts have authority to issue § 2251 stays in order to appoint counsel and provide sufficient time for counsel to prepare and file a proper habeas petition.

If the filing of a formal request for habeas counsel empowers a federal district court to appoint counsel

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[2] Respondent concedes, "arguendo," that an indigent death row prisoner who seeks to vacate or set aside a death sentence under § 2254 is entitled to the appointment of § 848 counsel before the filing of a habeas petition. RB at 16. *Amicus Curiae*, Criminal Justice Legal Foundation (hereafter CJLF), explicitly acknowledges that the § 848(q)(4)(B) right to attaches before the filing of a formal habeas petition. CJLF Brief at 12, 22-23. *See also Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994) (holding that the Section 848(q)(4)(B) right to counsel is mandatory).

under § 848(q)(4)(B), it should be considered the initiation of a "habeas proceeding" thereby triggering the stay provisions of § 2251. To conclude otherwise would create an artificial distinction between a "post-conviction proceeding under § 2254," 21 U.S.C. § 848(q)(4)(B), and a "habeas proceeding" which triggers the power to stay an execution under § 2251. In the absence of clear Congressional intent to the contrary such a strained construction is inappropriate and unnecessary. It would also vitiate the clear purpose of § 848 to insure that all indigent capital habeas petitioners have the benefit of counsel at all stages of the habeas corpus process, including the investigation of claims and preparation of the habeas petition.

When a habeas proceeding has thus commenced, the district court should be authorized under § 2251 to stay an execution whenever necessary to effectuate the prepetition right to counsel. Respondent's interpretation of "habeas proceeding" disregards the potential consequences for the counsel provisions under § 848(q)(4)(B) when a state schedules an execution before federal habeas counsel has been appointed and given sufficient time to prepare and file a proper habeas petition.

Respondent correctly observes that the right to counsel under 21 U.S.C. § 848(q)(4)(B) is a federal entitlement different from the underlying constitutional rights that are enforceable in a federal habeas action. However, Respondent then inexplicably concludes that the right is therefore not enforceable in a federal habeas proceeding. Respondent thus suggests that Congress enacted a statutory entitlement to appointed counsel for all indigents seeking relief in capital habeas proceedings but intended that it not be enforceable. To construe the provision in this way clearly defeats its purpose.

Other, more reasonable interpretations would further Congress' goal of providing counsel in capital federal habeas corpus proceedings. The most reasonable interpretation, and the one most likely intended by Congress, is that a "proceeding" to invoke and enforce the right to habeas counsel is ancillary to and inseparable from the

federal habeas proceeding.[3] Under that construction, as discussed above, the commencement of a proceeding seeking counsel also commences a "habeas proceeding" and triggers the § 2251 habeas stay provisions.

Except for the integral relationship between the right to habeas counsel and the right to challenge the constitutionality to prisoner's confinement and sentence in a § 2254 habeas proceeding, a motion for appointment of counsel and a stay of execution to protect the right to counsel under § 848 (q)(4)(B) could be construed as an action under 28 U.S.C. §§ 2201 and 1983 to enforce a federal right against encroachment by state action.[4] Such a proceeding could be brought under the court's general federal question jurisdiction. *See* 28 U.S.C. § 1331. While Mr. McFarland did not style his pleading a "complaint" nor explicitly invoke the court's jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, his motion pled facts which could theoretically constitute a cause of action under these statutes, and his request for a stay was tantamount to a request for a temporary injunction.

Since a proceeding seeking appointment of habeas counsel and a stay in connection therewith is brought in order to challenge a criminal conviction and sentence, under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), it probably

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[3] In *Hill v. Martin*, 296 U.S. 393, 403 (1935), Justice Brandeis defined "proceedings" as it is used in the Anti-Injunction Act as follows: "It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. . . . It applies alike to actions by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

[4] The Court has held that injunctions issued under 42 U.S.C. § 1983 meet the "expressly authorized" exception to the Anti-Injunction Act. *See Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972).

must be construed as a habeas corpus proceeding.[5] The commencement of such a proceeding therefore must also be considered the commencement of a "habeas proceeding."[6]

(2) Under the circumstances of this case, the district court had jurisdiction to issue a stay of execution in aid of its jurisdiction to appoint counsel under 21 U.S.C. § 848(q)(4)(B) and to effectuate and protect such an appointment order under 28 U.S.C. § 1651.

The All Writs Act, 28 U.S.C. § 1651, authorizes federal courts to grant stays or enter other orders "in aid of their respective jurisdictions" or to issue orders "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of *jurisdiction otherwise obtained*." RB at 23 (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977) (emphasis supplied)). As we have shown, *supra*, the filing of a motion for appointment of counsel under 21 U.S.C. § 848(q)(4)(B) invokes either the court's habeas corpus jurisdiction or its general federal question jurisdiction. Thus, even if the Court determines that § 2251 requires that a formal, legally sufficient habeas petition be filed before a stay may issue, upon the filing of a formal request for counsel, the court has jurisdiction to enter an order appointing counsel. At that point, the All

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[5] In *Preiser*, the Court broadly held that habeas corpus is the exclusive remedy for a state prisoner seeking to challenge the fact or duration of his confinement.

[6] Congress plainly intended for an indigent death row prisoner to have some means to enforce his rights under § 848(q)(4)(B). Under Respondent's theory the right cannot be enforced in a § 2254 proceeding and thus it must be treated as independent of the habeas corpus proceeding. In that event, it must be a proper subject for a § 1983 action seeking a temporary injunction to protect and enforce the right to counsel.

Writs Act authorizes a stay "in aid of [the court's] jurisdiction" and "to effectuate and prevent the frustration of" its order appointing counsel. *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). *Cf. Mallard v. U.S. District Court*, 490 U.S. 296, 309 (1989) (holding that if otherwise authorized, the appointment of counsel is an exercise of "jurisdiction").

B. Even if a § 848 motion does not invoke the court's habeas corpus or federal question jurisdiction and thereby permit the court to issue a stay, the All Writs Act permits the court to issue a stay to preserve its prospective jurisdiction over the habeas petition to be filed by appointed counsel.

If § 848(q)(4)(B) permits the appointment of counsel prior to the filing of a habeas petition, the district court has jurisdiction to stay a pending execution. *See* Point I(A) *supra*. However, if the court rejects a reading of § 848 which confers jurisdiction to issue a stay, the All Writs Act still provides ample authority for the district court to stay an execution to appoint counsel. Such a temporary stay could be entered "in aid of" the court's jurisdiction to entertain the habeas petition that is subsequently filed. The Anti-Injunction Act would not prevent such a stay because that Act's second exception is co-extensive with the All Writs Act.[7]

Respondent and *amicus* CJLF rely heavily on two decisions of this Court to support their argument concerning the scope of the second exception to the Anti-Injunction Act and the All Writs Act. RB at 9, 25 (citing *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 519 n.5 (1955), and *Vendo Co. v. Lektro-Vend*

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[7] The legislative history of the Anti-Injunction Act and the parallel language of the All Writs Act and second exception to the Anti-Injunction Act demonstrate that the two statutory provisions are *in pari materia* and must be interpreted similarly. *See* PB at 47-49.

Corp., 433 U.S. 623, 642 (1977) (plurality opinion)). However, neither *Clothing Workers* nor *Vendo Co.* will bear such weight.

In *Clothing Workers*, a private party in a labor dispute sought a federal district court injunction of state court proceedings, alleging that the state court was infringing on the National Labor Relations Board's exclusive jurisdiction over such matters. The district court and court of appeals denied the injunction, and this Court affirmed the denial for numerous reasons, all of which distinguish *Clothing Workers* from Mr. McFarland's case.

Under applicable federal law, the National Labor Relations Board, and not a private party, was authorized to seek interim relief from a district court pending final adjudication of a labor complaint by the Board. In other words, the person seeking the injunction did not have authority to invoke such relief from the court. At the time the injunction was sought from the district court, no complaint had been filed before the Board regarding the labor dispute at issue. Furthermore, the federal court of appeals, not the district court, had appellate jurisdiction over NLRB decisions. The district court did not have present or potential jurisdiction over the labor dispute at issue. Accordingly, the Court held that the federal district court was without authority under the Anti-Injunction Act – and, by implication, under the All Writs Act – to stay the pending state court proceedings because it possessed no prospective jurisdiction over the labor dispute. 348 U.S. at 519.

In *dictum* in a footnote, 348 U.S. at 519 n.5, the Court questions whether authority under the All Writs Act to issue an injunction in aid of prospective jurisdiction should extend beyond inferior and superior courts of the same judicial systems.[8]

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[8] Footnote 5 of *Clothing Workers* reads:

> We have been referred by petitioner to decisions in the lower federal courts under 28 U.S.C. § 1651 . . . and its antecedents holding that the Court of Appeals may resort to writ of mandamus or prohibition 'in aid of its jurisdiction' to prevent a district court from acting in a manner that would defeat the Court of Appeals' power of review. These decisions might be more relevant had the injunction been sought from the Court of Appeals. Only that court has the power to review decisions of the [NLRB]. In any event, it has never been authoritatively suggested that this example of injunctive aid to potential jurisdiction, which finds its roots in traditional concepts of the relationship between inferior and superior courts of the same judicial system, has any relevance where the offending action sought to be enjoined is insulated by two intervening and essentially unrelated systems, one of an administrative rather than judicial nature, the other the manifestation of a distinct sovereign authority.

348 U.S. at 519 n.5.

Finally, the Court also notes that, as a general matter, a federal injunction to prevent state courts from exercising jurisdiction over a subject matter pre-empted by federal law is inappropriate under the Anti-Injunction Act, because state courts can be trusted to enforce superior federal rights under the Supremacy Clause. *See id.* at 518 (if federal law pre-empts state law, presumably state courts will so hold).[9]

The rationale of *Amalgamated Clothing Workers* is simply inapplicable in the federal habeas context. Federal

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[9] This holding is simply a restatement of the federalism principle animating the Court's other Anti-Injunction Act cases. These cases reasoned that, because as a general rule the "lower federal courts possess no power whatever to sit in direct review of state court decisions," *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970), lower federal courts have no authority to stay state proceedings "in aid of jurisdiction" unless that jurisdiction vested before the state court proceedings are instituted. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642-43 (1977) (plurality opinion).

habeas jurisdiction is unlike any other type of federal subject matter jurisdiction addressed by the Court's Anti-Injunction Act cases to date. In every other circumstance, the lower federal courts are coequal courts of coordinate jurisdiction with state courts. Federal habeas corpus review, however, creates a markedly different relationship between the lower federal courts and the state courts. Under the federal habeas scheme, the state and federal courts are not "[two] essentially unrelated systems [insulated]" from each other. 348 U.S. at 519 n.5.

"It has long been established . . . that even a single federal judge may overturn the judgment of the highest court of a State" pursuant to 28 U.S.C. § 2241 *et seq.* *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981); *see also Wright v. West*, 112 S. Ct. 2482, 2497 (1992) (O'Connor, J., concurring, joined by Blackmun & Stevens, JJ.). In this unusual relationship, the federal habeas courts have an obligation to review state court judgments and decisions. As a result, the federal habeas courts' relationship to the state courts more closely resembles an appellate court's relationship to a lower court than the relationship between coequal courts. Thus, the same justifications may exist for allowing an injunction against state court proceedings to issue in aid of the federal habeas court's prospective jurisdiction over a state court conviction. Accordingly, the Anti-Injunction Act decisions regarding conflicts between federal and state courts of concurrent or coequal jurisdiction cannot be invoked to preclude the application of the second exception to the Anti-Injunction Act in the present context.

Respondent also selectively relies on dicta from the three-Justice plurality opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977), to support its arguments. RB 9 & n.3. Because of the fragmentation of the Court in *Vendo Co.*, the decision has little, if any, precedential value. *See* Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE, § 4224 at 525-526 (1978) ("Detailed analysis of the opinions in Vendo would serve no purpose because of the fragmentation of the Court. The decision establishes

that a federal court cannot enjoin a pending state court proceeding in the circumstances of Vendo itself, because five justices so held.").[10]

Even if Respondent's characterization of the plurality opinion is accurate, the rationale of *Vendo Co.* cannot apply in a federal habeas case. After it lost a breach of contract suit in state court, the state-court defendant in *Vendo Co.* assumed the role of plaintiff in federal court and sought to enjoin the execution of the state court judgment on the ground that the state court proceedings violated the federal antitrust laws. Since the federal antitrust claim at issue in the federal proceedings could have been asserted as an affirmative defense in the breach-of-contract suit in the state court, *Vendo Co.* involved concurrent state and federal actions concerned with the same federal issue. Indeed, the state court defendant originally did assert the federal defense, but subsequently abandoned it, apparently fearing that a hostile state court's rejection of the claim might preclude the federal suit on *res judicata* grounds. *See Vendo Co.*, 433 U.S. at 627.

Conversely, in the context of federal habeas corpus, state court review of federal constitutional claims does not preclude relitigation on federal habeas. *See Brown v. Allen*, 344 U.S. 443 (1953). In creating the federal habeas

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[10] Respondent suggests that the plurality opinion states the position of a majority of the Justices with regard to the second exception to the Anti-Injunction Act: "the concurring Justices [in *Vendo Co.*] expressed no *disagreement* with the plurality's analysis of the 'aid of jurisdiction' point, which was necessary to the judgment in which they concurred." RB at 9 (emphasis added). Respondent is incorrect. Justice Blackmun's concurring opinion – which was joined by Chief Justice Burger – only concurred "in the result" of the plurality's opinion "for reasons that differ significantly from [the reasons] expressed by the plurality." *Vendo Co.*, 433 U.S. at 643 (Blackmun, J., concurring in the result, joined by Burger, C.J.). Notably, Justice Blackmun did not address at all the plurality's discussion of the "in aid of jurisdiction" exception to the Anti-Injunction Act.

corpus statutory scheme, Congress specifically intended that prior state court adjudications of federal constitutional issues would not bind federal courts. The federalism rationale animating the Anti-Injunction Act – that federal court stays of state proceedings are inappropriate because the federal interests can be vindicated in the state courts[11] – is thus not appropriate in the special context of *de novo* federal habeas corpus review. This is not to say that the Anti-Injunction Act does not apply to federal habeas proceedings, but merely that its "in aid of jurisdiction" exception, when applied to federal habeas, should incorporate the principles developed to ensure the protection of a superior court's appellate obligation and jurisdiction to review the decisions of an inferior court.

In sum, the *dicta* in *Clothing Workers* and *Vendo Co.* do not apply in the unique context of federal habeas. The federal habeas statute gives federal district courts the power to review – and effectively to reverse – state court proceedings. That jurisdiction is not concurrent or shared with the state courts, but exclusive. A stay to prevent the prisoner from being executed before federal habeas jurisdiction may be exercised is thus a stay "in aid of" the federal court's prospective jurisdiction every bit as much as the stay approved in *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966). Thus, such a stay is expressly authorized by the All Writs Act and the first and second exceptions to the Anti-Injunction Act.

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[11] *See* Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C.L. Rev. 49, 51-52 (1987) ("The non-interference [rationale of the Anti-Injunction Act] rest[s] on the underlying assumption that state courts are ordinarily just as competent at deciding federal questions . . . as are federal courts. . . . ").

C. The Canon of *Inclusio Unius Est Exclusio Alterius* Does Not Apply.

Respondent argues that the *inclusio unius est exclusio alterius* canon of statutory interpretation precludes application of the All Writs Act in this case. According to Respondent, because § 2251 expressly provides for stays after a habeas corpus petition has been filed, Congress must have intended that the broader authority of the All Writs Act to issue a stay would never apply in a habeas context. RB at 16-17, 22. Respondent cites *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985):

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority and not the All Writs Act that is controlling.

Id. at 43; *see also* RB at 22.[12]

Respondent's attempt to invoke the *inclusio unius* maxim is unfounded. This principle " 'long ha[s] been subordinated to the doctrine that courts will construe the details of an act in conformity with its . . . general purpose.' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-88 n.23 (1983) (citation omitted). The purpose of the larger habeas corpus statutory scheme, including § 848(q)(4)(B), would be frustrated if a stay of execution could not issue before an indigent *pro se* death row inmate were able to file a habeas corpus petition. Indeed, in *Pennsylvania Bureau of Correction*, this Court declined to "categorically rule out reliance on the All Writs Act," cautioning that "exceptional circumstances" might reveal

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[12] In *Pennsylvania Bureau of Correction*, the Court refused to permit a district court to use the All Writs Act to require a U.S. Marshal to bring a prisoner to court to testify as a witness, because another federal statute specifically provided that such a prisoner could be called to testify through a writ of habeas corpus *ad testificandum* directed to the custodian of the prisoner.

"the inadequacy of [the] habeas corpus [statutes]" as applied in certain cases; it therefore expressly left open "the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it." 474 U.S. at 43. Unquestionably, Mr. McFarland's case presents such "exceptional circumstances."

If, as Respondent contends, § 2251 is limited to post-petition stays, then, unlike the statute in *Pennsylvania Bureau of Correction*, § 2251 does not "specifically address[] the particular issue at hand. . . . " *Id.* The All Writs Act, on the other hand, does. If Congress did not foresee the issue presented by this case when it provided for the mandatory appointment of counsel for death-sentenced inmates, then that "statutory interstice" can properly be filled by a stay pursuant to the All Writs Act. *Id.* at 41.[13]

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[13] *Amicus* CJLF also relies on the *inclusio unius* maxim, contending that "Congress knows how to unambiguously authorize pre-filing stays when it deems them necessary." CJLF points to 28 U.S.C. § 2101(f), the statute that expressly gives this Court jurisdiction to enter a stay of execution pending the filing of a certiorari petition. *See* Brief of *Amicus* CJLF at 6-8. CJLF also argues that "McFarland asserts that this Court considers the All Writs Act to be the primary source of its stay authority, but his authority for this proposition is weak." *Id.* at 7.

The CJLF is correct that § 2101(f) applies in a direct appeal case. But § 2101(f) does not give this Court authority to issue stays in capital habeas appeals prior to the filing of a certiorari petition. Section 2101(f) provides that, "[i]n any case in which *the final judgment or decree of any court subject to review by the Supreme Court on writ of certiorari*, the execution and enforcement of *such judgment or decree* may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." *Id.* (emphasis added). The "final judgment or decree . . . subject to review" in a direct appeal case is the state court conviction and sentence, but in a federal habeas case the judgment under review in this Court is the decision of a federal court of appeals. Thus, in a federal habeas case, the only possible authority permitting this Court to grant

II. BY CREATING A PRE-FILING RIGHT TO FEDERAL HABEAS COUNSEL, CONGRESS INTENDED TO EMPOWER THE FEDERAL COURTS TO GRANT PRE-FILING STAYS OF EXECUTION, AND RESPONDENT'S ARGUMENT MISREADS CONGRESSIONAL INTENT.

As we have argued, the congressional intent behind § 848(q)(4)(B) is a highly important factor in deciding whether the federal courts have the power to stay an execution before a petitioner can file a legally sufficient application, when a stay is necessary for appointed counsel to provide meaningful assistance. Respondent's position that § 848(q)(4)(B) does not empower the federal courts to stay an execution imputes an anomalous and unrealistic intent to Congress.

As noted, Respondent and its *amici* do not dispute the essential remedial purpose behind § 848(q)(4)(B): to assure that death sentenced inmates have the assistance of counsel in federal habeas proceedings, including assistance in preparing and filing the petition. Yet at the same time, Respondent imputes an intent to Congress that, on its face, is inconsistent with this remedial purpose. Respondent argues that despite the right to counsel, Congress did not intend to allow the courts to stay executions prior to the filing of a petition, even if counsel is appointed so close to an execution date that no meaningful assistance can be provided without a stay. Respondent thus imputes to Congress the intention of subordinating

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stays is the All Writs Act. *Cf. Woodward v. Hutchins*, 464 U.S. 377 (1984) (per curiam) (citing § 1651); *see also Laws v. Delo*, 491 U.S. 913 (1989) (not citing source of authority for stay); *Bell v. Lynaugh*, 488 U.S. 905 (1988) (same); *see generally Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (recognizing the practice of granting stays pending the filing of certiorari petitions in federal habeas cases); *Autry v. Estelle*, 464 U.S. 1 (1983) (same). Notably, this Court has never suggested that the *inclusio unius* maxim precludes such stays in view of § 2101.

the federal right to counsel to the date setting practices of a particular state.

Realizing that Congressional intent would not ordinarily reflect such disharmony, Respondent suggests that no inmate will ever present a legitimate, equitable need for a stay of execution under circumstances in which he has not first had the meaningful assistance of counsel. RB at 16, 17, 22, 35. In Respondent's view, federal appointment of habeas counsel can always be obtained sufficiently in advance of an execution date to avoid any need for a pre-petition stay of execution. *Id.* at 16. *A fortiori*, the only circumstance in which a condemned prisoner might assert such a need is when he, or an agency like the Texas Resource Center, fails to seek appointment of habeas counsel far enough in advance. Respondent uses this case as an example: "McFarland did not have to wait until an execution date was scheduled, much less until 5 days before the scheduled date, to file a request for counsel pursuant to § 848(q)." RB at 22. Since a prisoner would have only himself to blame if he failed to "utilize available processes in a timely fashion," *id.* at 17, no court will ever face a legitimate request for a stay of execution before an application is filed.

To impute such an intent to Congress, however, requires a willingness to ignore the real life circumstances in which condemned, unrepresented prisoners face execution. In Texas, for example, executions are often scheduled to take place within forty-five days of a denial of certiorari on direct appeal. *See, e.g., Washington v. Texas*, 113 S.Ct. 2388 (1993).[14] If habeas counsel is appointed after review is denied, she will almost never have adequate time between appointment and the scheduled execution in which to investigate, prepare and file a complete habeas petition.[15]

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[14] *See* Appendix A (listing such cases).

[15] As the American Bar Association *amicus* brief points out, objective studies reveal that the time necessary to represent capital petitioners in state habeas proceedings is 600 hours, and the time necessary to represent capital petitioners in federal district court habeas proceedings is 300 hours.

Nor may an indigent prisoner fairly be blamed for waiting until after certiorari is denied before seeking the appointment of counsel. *Amicus* CJLF argues that federal appointment could and should be sought long before certiorari is denied, so that the several-month period between affirmance on direct appeal and denial of certiorari can be used to investigate, research, and prepare the federal habeas petition. *See* Brief of *Amicus Curiae* CJLF at 22-23. While this suggestion has utilitarian value, surely no one, not even Respondent, can fault Mr. McFarland for not having pursued this creative course. The idea, first, is exceedingly novel; more important, it collides with federalism concerns. Those concerns suggest that an unrepresented inmate should first seek counsel and a stay, modification, or withdrawal of his execution date in connection with state habeas proceedings – precisely as Mr. McFarland did in state court.[16] In addition, because of Texas' rule against proceeding simultaneously in both state and federal court (the "two forum rule"), a condemned prisoner cannot seek appointment of counsel in state court to file a state habeas petition while certiorari proceedings are pending in this Court after direct appeal. *See Ex Parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977).

Thus, a Texas prisoner whose execution is scheduled for forty-five days or less after denial of certiorari, and

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[16] Notably, Respondent does not embrace CJLF's suggestion. To the contrary, Respondent's position render CJLF's suggestion academic: "If it is assumed, *arguendo*, that McFarland correctly characterizes § 848(q) as authorizing the appointment of counsel in the absence of a pending habeas action, it was incumbent upon the Center, *after approaching the trial court in a timely manner*, to also approach the federal district court in a timely manner and request the appointment of counsel." RB at 35 (emphasis supplied).

who is unrepresented for habeas proceedings, will have no opportunity to seek federal counsel until he or she is already within forty-five days of execution. Such a person cannot fairly be blamed for "fail[ing] . . . to utilize available processes in a timely fashion," RB at 17, and yet counsel appointed to represent that person may not have enough time to prepare an adequate habeas petition in the time between appointment and execution. Nevertheless, under Respondent's reading of congressional intent, that person's execution could not be stayed by a federal court.

Common sense and experience suggest that there are other circumstances in which a pre-petition stay is necessary to give effect to the statutory right to counsel. Indeed, as the record in this case reflects, present circumstances in Texas make it increasingly difficult to recruit counsel to take Texas capital habeas cases – which led us to argue on Mr. McFarland's behalf that § 848(q)(4)(B) counsel should be appointed before the filing of a habeas petition. *See* PB at 1-7.

To date, counsel typically have not been appointed in advance of filing a federal petition. Indeed, until the Fifth Circuit's decision in *Gosch v. Collins*, 8 F.3d 20 (5th Cir. 1993), there was no need to pursue such a practice, because other mechanisms assured that no one would be executed without the opportunity for assistance of counsel. PB at 4-7. *Gosch*, however, marked the end of that era of reasonable compromise, and initiated a uniquely critical period in the post-conviction representation of condemned prisoners in Texas. If all such Texas prisoners were required to file fully investigated and adequately prepared habeas petitions filed merely to secure a stay, it would simply be a matter of time before Texas executed an unrepresented inmate.[17] Because the Resource Center

[17] Respondent faults the Resource Center for failing to represent Mr. McFarland after this Court denied his petition for writ of certiorari June 7, 1993. What Respondent fails to mention, however, is that *this Court denied certiorari in an unprecendented twenty-nine cases in June alone. See* Appendix B. Twenty-four cases were denied on a single day, June 28. *Id.* As far as we can ascertain, these are records that no state in the nation's history can match. The State of Texas witnessed thirty-nine execution dates in the weeks between June 1 and October 21, when Mr. McFarland asked for a lawyer to represent him in district court. The State executed ten inmates during this period, seven in the five weeks from July 30 to September 3. NAACP Legal Defense Fund, *Death Row, USA* 9-10 (Winter 1993). These too are records for the post-*Furman* era. Many of these cases were handled, directly or indirectly, by attorneys with the Resource Center.

It was in the middle of this period, on August 16, that the trial court, without notice to the Resource Center, first scheduled Mr. McFarland to be executed. Had the Resource Center chosen to represent Mr. McFarland under these circumstances, it is possible the case before this Court would bear the name of another inmate, but it would most assuredly be before this Court.

was neither funded nor staffed to undertake direct representation on such a scale, and its ability to recruit counsel could not keep up with the demand, it sought to invoke the only remedy still available – the right to counsel guaranteed by § 848(q)(4)(B).

Obviously, Respondent and the Resource Center's other courtroom adversaries take a different view, and blame the Resource Center for "manufacturing" the crisis in representation. The Resource Center stands by its statements and the arguments of *amici*, which convincingly establish the unfairness of the present circumstances in Texas. Moreover, while the Resource Center could defend the methodological integrity of the Spangenberg Report, or explain the way in which it manages its resources and marshalls its determined efforts even in the face of more than 100 execution dates per year, such a demonstration is unnecessary to the issue before the Court. The question before this Court is simply whether the district court had jurisdiction to stay an imminent

execution.[18] The Congress that enacted 21 U.S.C. § 848(q)(4)(B) and long ago enacted 28 U.S.C. § 2251 clearly intended for death sentenced inmates to have a day in court before being executed. Respondent misconstrues congressional intent in arguing the contrary.

CONCLUSION

For these reasons, as well as those advanced in Mr. McFarland's opening brief, the judgment of the Fifth Circuit must be reversed and the case remanded to the district court for the appointment of counsel to represent Mr. McFarland in his § 2254 proceeding.

Respectfully submitted,

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[18] *See FTC v. Dean Foods Company*, 86 S.Ct. 1738, 1741 (1966) ("Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true.") The district court's ruling that it had no jurisdiction in Mr. McFarland's case was based solely on the failure to file a petition and not on any other grounds.

APPENDIX A

EXECUTION DATES WITHIN 45 DAYS AFTER CERTIORARI DENIED

INMATE	SUPREME CT. CASE NO.	DATE CERTIORARI DENIED	EXECUTION DATE
Hai Hai Vuong	91-8198	11/30/92	1/6/93
Terry Washington	92-8211	5/17/93	6/17/93
Gary Sterling	92-5167	12/14/92	1/25/93
Robert White	92-7042	3/8/93	4/15/93
Leopoldo Narvaiz	92-7039	3/8/93	4/23/93
Kevin Zimmerman	93-5923	GVRed 10/29/93	11/2/93

APPENDIX B

PETITIONS FOR WRIT OF CERTIORARI RESOLVED BY THIS COURT IN TEXAS CAPITAL CASES JUNE, 1993

A. Petitions Denied:

1. *Selvage v. Collins*, 113 S.Ct. 2445 (June 1, 1993)
2. *McFarland v. Texas*, 113 S.Ct. 2937 (June 7, 1993)
3. *Jernigan v. Collins*, 113 S.Ct. 2977 (June 14, 1993)
4. *Moreland v. Texas*, 113 S.Ct. 2973 (June 14, 1993)
5. *Green v. Texas*, 113 S.Ct. 3011 (June 21, 1993)
6. *Boggess v. Texas*, 113 S.Ct. 3034 (June 28, 1993)
7. *Jackson v. Texas*, 113 S.Ct. 3034 (June 28, 1993)
8. *Wilkerson v. Collins*, 113 S.Ct. 3035 (June 28, 1993)
9. *Gosch v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
10. *Goss v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
11. *James v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
12. *Fuller v. Texas*, 113 S.Ct. 3035 (June 28, 1993)
13. *Joiner v. Texas*, 113 S.Ct. 3044 (June 28, 1993)
14. *Kelly v. Texas*, 113 S.Ct. 3044 (June 28, 1993)
15. *Draughon v. Texas*, 113 S.Ct. 3045 (June 28, 1993)
16. *Newton v. Texas*, 113 S.Ct. 3045 (June 28, 1993)
17. *Dunn v. Texas*, 113 S.Ct. 3045 (June 28, 1993)
18. *Cantu v. Collins*, 113 S.Ct. 3045 (June 28, 1993)
19. *Bonham v. Texas*, 113 S.Ct. 3046 (June 28, 1993)
20. *Jacobs v. Texas*, 113 S.Ct. 3046 (June 28, 1993)
21. *Blue v. Texas*, 113 S.Ct. 3046 (June 28, 1993)
22. *Rabbani v. Texas*, 113 S.Ct. 3047 (June 28, 1993)
23. *Cooks v. Texas*, 113 S.Ct. 3048 (June 28, 1993)
24. *Hathorn v. Texas*, 113 S.Ct. 3042 (June 28, 1993)
25. *Bridge v. Collins*, 113 S.Ct. 3048 (June 28, 1993)
26. *Holland v. Collins*, 113 S.Ct. 3043 (June 28, 1993)
27. *Harris v. Collins*, 113 S.Ct. 3069 (June 28, 1993)
28. *Drew v. Collins*, 113 S.Ct. 3044 (June 28, 1993)
29. *Cantu v. Texas*, 113 S.Ct. 3046 (June 28, 1993)

B. Petitions Granted

1. *Richardson v. Texas*, 113 S.Ct. 3026 (June 28, 1993) (*gvr'd in light of Johnson v. Texas*, 113 S.Ct. 2658 (1993))
2. *Earhart v. Texas*, 113 S.Ct. 3026 (June 28, 1993) (same)
3. *Granviel v. Texas*, 113 S.Ct. 3027 (June 28, 1993) (same)
4. *Lucas v. Texas*, 113 S.Ct. 3029 (June 28, 1993) (same)
5. *Hawkins v. Texas*, 113 S.Ct. 3029 (June 28, 1993) (same)

C. Decision On The Merits

1. *Johnson v. Texas*, 113 S.Ct. 2658 (June 14, 1993)

APPENDIX C

21 U.S.C. § 848(q):

(q) Appeal in capital cases; counsel for financially unable defendants

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that –

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

(4)(A) Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either –

(i) before judgment; or

(ii) after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(B) In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

(5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less

than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications,[8] for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

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[8] So in original. The comma probably should not appear.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

28 U.S.C. § 1651(a):

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2251:

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

29 U.S.C. § 2254:

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of

available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing

evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

28 U.S.C. § 2283:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.